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No. 04-728

IN THE

Supreme Court of the United States

KIMBERLY DOANE,
A/K/A KIMBERLY HARIG, PETITIONER

v.

EDUCATIONAL CREDIT MANAGEMENT CORPORATION,
RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

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RESPONDENT'S RULE 29.6 DISCLOSURE STATEMENT

Educational Credit Management Corporation (ECMC) is a private, nonprofit corporation organized under the laws of the State of Minnesota and headquartered in St. Paul, Minnesota. Its parent corporation is ECMC Group, Inc., a private nonprofit corporation organized under the laws of the State of Delaware. No publicly held company owns more than 10% of ECMC or ECMC Group's stock.

PARTIES TO THIS PROCEEDING

Kimberly Doane, as stated in Petitioner's statement.

Respondent ECMC is a student loan guaranty agency in the Federal Family Education Loan Program (FFELP) and is governed by the Higher Education Act, 20 U.S.C. § 1070 *et seq.* and 34 C.F.R. § 682.100 *et seq.* In addition, ECMC provides specialized guarantor services to the United States Department of Education (ED) and other FFELP guaranty agencies, including accepting the transfer of title to certain student loan accounts on which the borrower has filed bankruptcy. ECMC is headquartered in Minnesota.

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RELEVANT AUTHORITY INVOLVED

In addition to the authority referenced by Petitioner, this matter also involves the following constitutional provisions, statutes, and rules:

A. U.S. Const. amend. V:

> No person shall be . . . be deprived of life, liberty, or property, without due process of law; . . . .

B. 11 U.S.C. § 1328(a)(2):

> (a) As soon as practicable after completion by the debtor of all payments under the plan, unless the court approves a written waiver of discharge executed by the debtor after the order for relief under this chapter, the court shall grant the debtor a discharge of all debts provided for by the plan or disallowed under section 502 of this title, except any debt –
>
> . . . .
>
> (2) of the kind specified in paragraph (5), (8), or (9) of section 523(a) of this title.

C. 11 U.S.C. § 523(a)(8):

> (a) A discharge under section . . . 1328(a) of this title does not discharge an individual debtor from any debt–

. . . .

(8) for an educational benefit overpayment or loan made, insured or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or nonprofit institution, or for an obligation to repay funds received as an educational benefit, scholarship or stipend, unless excepting such debt from discharge under this paragraph will impose an undue hardship on the debtor and the debtor's dependents. Thus, pursuant to these provisions, the Bankruptcy Code expressly excepted student loan debt from § 1328(a)'s general discharge provisions and required a showing of undue hardship before a debtor could obtain a discharge of student loan debt.

D. Fed. R. Bankr. P. 7001(6):

An adversary proceeding is governed by the rules of this Part VII. The following are adversary proceedings:

. . . .

(6) a proceeding to determine the dischargeability of a debt;

E. Fed. R. Bankr. P. 7003:

Rule 3 F.R.Civ.P. applies in adversary proceedings.

F. Fed. R. Bankr. P. 7004(b)(3):

. . . .

(b) Service by first class mail

Except as provided in subdivision (h), in addition to the methods of service authorized by Rule 4(e) -(j) F.R.Civ.P., service may be made within the United States by first class mail postage prepaid as follows:

(3) Upon a domestic or foreign corporation or upon a partnership or other unincorporated association, by mailing a copy of the summons and complaint to the attention of an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant.

INTRODUCTION

This is a case about due process of law. It is not about whether the Petitioner's "clean hands" justify the serendipitous discharge of her student loan debt or whether the responsibility for the erroneous form discharge orders lies with the Administrative Office of U.S Courts or the federal bankruptcy courts. Rather, in granting ECMC's motion for relief under Fed. R. Civ. P. 60 (b)(4), the courts below ratified the fundamental precept that all parties, even student loan creditors, are entitled to notice *and* an opportunity for a hearing before their substantive rights can be affected. Contrary to Petitioner's Brief, there is no split of authority within the federal circuit courts on this issue. And, while due process concerns always raise important federal questions, neither the facts nor the law of this case presents any compelling basis for invoking this Court's review.

COUNTER-STATEMENT OF THE CASE AND FACTS

On June 14, 1996, Petitioner Kimberly Harig Doane (Doane) filed a Voluntary Petition under Chapter 13 of the United States Bankruptcy Code in the United States Bankruptcy Court for the Western District of Virginia, Roanoke Division.[1] On her Chapter 13 schedules, Doane listed her unsecured student loan

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[1] This Statement of Facts is largely drawn from the district court's Order, dated October 27, 2003, found in the Petitioner's Appendix (Pet. App.), at A-8.

debt. The original holder of her student loan debt ultimately assigned it to Educational Credit Management Corporation (ECMC) on or about July 14, 1997.[2]

Along with her petition, Doane submitted a 36-month plan, proposing to pay $35.00 a month to her unsecured creditors, which included her student loan debt. Doane's plan was confirmed without objection on November 14, 1996. Significantly, Doane did not suggest in her plan that her student loan debt would be discharged upon confirmation, nor did she ever file an adversary proceeding in her Chapter 13 bankruptcy proceeding to discharge her student loan debt pursuant to 11 U.S.C. § 523(a)(8).

Doane completed her payments under the plan, and the bankruptcy court entered its Order Discharging Debtor After Completion of Chapter 13 Plan, pursuant to 11 U.S.C. § 1328, on September 10, 1999.

11 U.S.C. § 1328 defines the discharge granted to debtors who complete a Chapter 13 plan. The law in effect on the date that Doane was granted a discharge read in pertinent part:

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[2] ECMC is a student loan guaranty agency in the Federal Family Education Loan Program (FFELP) and is governed by the Higher Education Act, 20 U.S.C. § 1070 *et seq.* and 34 C.F.R. § 682.100 *et seq.* In addition, ECMC provides specialized guarantor services to the United States Department of Education (ED) and other FFELP guaranty agencies, including accepting the transfer of title to certain student loan accounts on which the borrower has filed bankruptcy.

> (a) As soon as practicable after completion by the debtor of all payments under the plan, unless the court approves a written waiver of discharge executed by the debtor after the order for relief under this chapter, the court shall grant the debtor a discharge of all debts provided for by the plan or disallowed under section 502 of this title, except any debt –
>
> . . . .
>
> (2) of the kind specified in paragraph (5), (8), or (9) of section 523(a) of this title.

Section 523(a)(8), referenced in § 1328(a), provided:

> (a) A discharge under section . . . 1328(a) of this title does not discharge an individual debtor from any debt–
>
> . . . .
>
> (8) for an educational benefit overpayment or loan made, insured or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or nonprofit institution, or for an obligation to repay funds received as an educational benefit, scholarship or stipend, unless excepting such debt from discharge under this paragraph will impose an undue hardship on the debtor and the debtor's dependents. Thus, pursuant to these

> provisions, the Bankruptcy Code expressly excepted student loan debt from § 1328(a)'s general discharge provisions and required a showing of undue hardship before a debtor could obtain a discharge of student loan debt.

In Doane's case, however, the form discharge order entered by the bankruptcy court contained language purporting to discharge Doane's student loan debt contrary to the law in effect on September 10, 1999. Specifically, the discharge order stated:

> 1. Pursuant to 11 U.S.C. § 1328(a), the debtor is discharged from *all* debts provided for by the plan or disallowed under 11 U.S.C. § 502 except any debt:
>
> . . . .
>
> (c) For a student loan or educational benefit overpayment as specified in 11 U.S.C. § 523(a)(8) *in any case in which discharge is granted prior to October 1, 1996;*

(Emphasis added). The italicized language is what the parties and the courts below have referred to as the "sunset provision" or "sunset language." The sunset language arose from the 1990 amendments to the Bankruptcy Code, which made student loan debt nondischargeable in Chapter 13 bankruptcies unless a debtor separately filed an adversary proceeding initiated by service of a summons and complaint upon

the student loan creditor.[3] Such an adversary proceeding requires a trial at which the debtor bears the burden of proving undue hardship pursuant to 11 U.S.C. § 523(a)(8); Fed. R. Bankr. P. 7001(6).

The sunset provision stated that the exception of student loan debt from a Chapter 13 discharge would be effective "in all cases in which discharge was granted prior to October 1, 1996." This sunset provision was incorporated into the form discharge order that was adopted nationwide after the 1990 amendments.

On July 23, 1992, Congress repealed the sunset provision, thereby continuing the requirement that student loan debt could only be discharged under the provisions stated in § 523(a)(8). *See* 11 U.S.C. § 1328, Historical and Statutory Notes (citing Pub. L. No. 102-325). Unfortunately, after the sunset provision was repealed in 1992, the bankruptcy courts in the Western District of Virginia continued to use the form discharge order that contained the sunset language.

When Doane received her Chapter 13 discharge on September 10, 1999, the bankruptcy court entered the outdated, improper form discharge order containing the sunset language, which purported to discharge Doane's student loan debt even though she herself had not requested a discharge of her student loan debt,

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[3] Unlike Chapter 7 cases, prior to 1990, student loans were discharged under the Chapter 13 super discharge provision, regardless of time in repayment or undue hardship considerations. In 1990, however, Congress amended § 1328 to except student loan debt from the general Chapter 13 discharge provisions. *See* Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508 (1990).

either improperly through her plan or by filing an adversary proceeding. Neither the parties nor the bankruptcy court itself dispute that the form discharge order contravened the law in effect on its date of entry.

The bankruptcy clerk mailed the form discharge order to ECMC at the address provided in the assignment of claim but not to the attention of a person authorized to accept service of process pursuant to Fed. R. Bankr. P. 7004(b)(3). No one appealed that order within the ten days provided by Fed. R. Bankr. P. 8002(a). After Doane's discharge, ECMC initiated collection procedures as it was required to do in its capacity as a guaranty agency under the Federal Family Education Loan Program.

Doane reopened her bankruptcy case and filed a Motion for Contempt on May 3, 2001, asserting claims involving non-Title 11 law and alleging that ECMC had attempted to collect discharged student loan debt. In addition to responding timely to Doane's motion, ECMC moved for relief from the outdated, improper discharge order under Fed. R. Civ. P. 60(a) and 60(b)(4), on the grounds that the order contained a clerical mistake and/or that the order was void because it violated ECMC's due process rights.

The bankruptcy court wholly denied ECMC's motion on May 23, 2002. Interestingly, the bankruptcy court fully acknowledged that the outdated, improper discharge order did not reflect the law in effect on the date it was entered. Instead of correcting the error, however, the bankruptcy court decided that its error constituted neither a clerical mistake nor a denial of due process to ECMC.

After its request for leave to appeal the May 23, 2002, Order was denied as interlocutory, ECMC filed a Rule 60(b)(4) and Rule 60(b)(6) motion in Doane's main bankruptcy case (not in the adversary proceeding), reasserting its initial grounds for relief and also arguing that the bankruptcy court lacked subject matter jurisdiction to enter an order not in compliance with the Bankruptcy Code. By order dated December 20, 2002, the bankruptcy court again denied ECMC's Rule 60 motions filed in the main case, incorporated its May 23, 2002, Order and Decision, and held that the form discharge order issue was ripe for appeal.

On appeal, U.S. District Court Chief Judge Samuel G. Wilson reversed the bankruptcy court, holding that neither Doane nor the bankruptcy court had provided the requisite notice to ECMC that its substantive rights were at issue or the opportunity to be heard *before* the improper discharge order was entered. Relying on Fourth Circuit law, the district court stated that "absent specific notice [pursuant to Fed. R. Bankr. P. 7004(b)(3)] of a debtor's intent to discharge a student loan debt, including the requisite service of process in an adversary proceeding, a court may not discharge student loan debt without violating due process." (citing *Banks v. Sallie Mae Servicing Corp. (In re Banks)*, 299 F.3d 296, 302 (4th Cir. 2002)). In addition to defective notice, the district court also noted that entry of the improper discharge order violated due process by denying ECMC an opportunity to be heard *before* the bankruptcy court discharged Doane's student loan debt. Specifically, the district court held that,

> ECMC failed to receive any notice of the purported discharge until after the discharge order, when it rights were effectively decided. Although ECMC could have appealed the discharge order within ten days of entry, the lack of appropriate notice under the Bankruptcy Rules and Code provided no meaningful notice or opportunity to be heard prior to entry of the order. In fact, ECMC could have challenged entry of the discharge order only if it was able to anticipate the error before the bankruptcy court even entered it. Such a deficiency falls short of the notice standard applied in *Banks*, and violates due process.

As a result, the district court held that the form discharge order was entered in a manner inconsistent with due process and was, therefore, void pursuant to Rule 60(b)(4).

Doane appealed to the Fourth Circuit Court of Appeals. Four days before oral argument, the court removed the case from the oral argument calendar and decided the case on the briefs. On June 28, 2004, the Fourth Circuit issued a *per curiam* unpublished decision affirming the district court. *See* 2004 WL 1433436 (4th Cir. June 28, 2004). The Fourth Circuit subsequently denied Doane's petition for rehearing en banc, and Doane has now timely petitioned for this Court's review.

REASONS FOR DENYING CERTIORARI

I. The Fourth Circuit's decision stands solidly on decades of Supreme Court precedent regarding a party's constitutional right to due process.

More than five decades ago, this Court held that due process requires that "deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). In *Mullane*, this Court defined the notice necessary to meet the minimal standards of due process as "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Id.* at 314. Additionally, *Mullane* requires that the opportunity for a hearing precede the deprivation of rights because right to be heard has "little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce, or contest." *Id.*

On May 17, 2004, in *Tenn. Student Assistance Corp. v. Hood*, this Court prescribed the precise process due to a student loan creditor in a student loan discharge case. 124 S. Ct. 1905 (2004). Specifically, this Court stated that

> Section 523(a)(8) is "self-executing. *Unless the debtor affirmatively secures a hardship determination, the discharge order will not include a student loan debt.*
>
> . . . .

> Because student loan debt is not automatically dischargeable, . . . the Federal Rules of Bankruptcy Procedure provide creditor greater procedural protection. See Fed. Rules Bkrtcy. Proc. 7001(6), 7003, and 7004. *The current Bankruptcy Rules require the debtor to file an "adversary proceeding" . . . to discharge his student loan debt. . . . [A]s prescribed by the Rules, an "adversary proceeding" requires the service of a summons and a complaint.* Rules 7001(6), 7003, and 7004.

Hood, 124 S. Ct. at 1912-13 (citations omitted) (emphasis added). *Hood* thus specifies which bankruptcy procedural rules, that is, what level of notice and what type of hearing opportunity, are required to effect due process under *Mullane*.

The Fourth Circuit's *Doane* decision comports with *Hood*'s recitation of the procedural process due in student loan discharge cases. *See Educ. Credit Mgmt. Corp. v. Doane (In re Doane)*, 2004 WL 1433436, at *1 (4th Cir. June 28, 2004), *aff'g Educ. Credit Mgmt. Corp. v. Doane (In re Harig)*, 302 B.R. 177 (W.D. Va. 2003). The Fourth Circuit held that the improper discharge order was void because it was entered in violation of ECMC's due process rights. 2004 WL1433436, at *2. The *Doane* court emphasized that "'due process entitle[s] the creditor to receive notice . . . as provided by the Bankruptcy Rules.'" *Id.* (citing *Banks v. Sallie Mae Servicing Corp. (In re Banks)*, 299 F.3d 296, 302 (4th Cir. 2002)).

Likewise, in *Banks*, the Fourth Circuit referenced the same bankruptcy rules cited by the Supreme Court in *Hood*. Specifically, *Banks* held that, to discharge a student loan, a debtor must initiate an adversary proceeding, complete with a summons and complaint, pursuant to Fed. R. Bankr. P. 7001(6) and 7003. *Banks v. Sallie Mae Servicing Corp. (In re Banks)*, 299 F.3d 296, 300-01 (4th Cir. 2002). And, most importantly, the debtor must serve the summons and complaint pursuant to Fed. R. Bankr. P. 7004, which, in the case of a corporation such as Great Lakes or ECMC, must be upon "an officer, a managing or general agent, or to any agent authorized by appointment or by law to receive service of process." *Id.* at 301.

The Fourth Circuit explained the rationale behind the "heightened notice" requirement:

> Fed. R. Bankr. P. 2002(b) does not require specific notice of plan provisions affecting a particular creditor, nor does it require the notice to be served in any particular manner or upon any particular person. "[T]here are many aspects to and actions that may be taken in bankruptcy cases which affect the general administration of the case and all creditors generally, but none specifically." Generally, such matters require "notice," but not service of process. When the rights of specific parties become an issue, however, service of the initiating motion or objection on the affected party is required. Fed. R. Bankr. P. 7003, 7004. Mailing the proposed plans, the hearing notice, and the confirmation

> order satisfies the "notice" requirement under Rule 2002, but not the service and summons requirements of Rule 7004.

Banks, 299 F.3d at 301 (internal citation omitted); *see also In re Boykin*, 246 B.R. 825, 828-29 (Bankr. E.D. Va. 2000) (distinguishing general notice provision applicable in bankruptcy proceedings from service of process requirements in an adversary proceeding).

II. There is no split among the circuit courts of appeal.

Every appellate court that has reviewed the validity of the form discharge orders on due process grounds has granted relief to the student loan creditor.[4]

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[4] *See, e.g., Poland v. Educ. Credit Mgmt. Corp. (In re Poland)*, 382 F.3d 1185, 1189 (10th Cir. 2004) (holding that *Andersen* does not apply and the improper form discharge order cannot discharge the student loan debt); *Educ. Credit Mgmt. Corp. v. Doane (In re Harig)*, 302 B.R. 177 (W.D. Va. 2003), *aff'd* 2004 WL1433436, at *1 (4th Cir. June 28, 2004) (granting relief under Rule 60(b)(4) because improper form discharge order violates ECMC's due process rights); *In re Hanson*, 308 B.R. 903 (W.D. Wis. 2004) (holding that the improper discharge orders are void) (*appealed by debtor and argued to 7th Circuit on November 12, 2004*); *Pearson v. United States Dep't of Educ. (In re Pearson)*, 279 B.R. 612, 616-17 (Bankr. M.D. Ga. 2002) (following remand instructions from district court and holding that the improper discharge order is not binding on ECMC because the order is void under Fed. R. Civ. P. 60(b)(4)); *but see Peterson v. Student Loan Mktg. Assoc. (In re Peterson)*, 251 B.R. 441 (Table), 1999 WL 977069, at **4 & n.6 (B.A.P. 10th Cir. Oct. 25, 1999) (unpublished) (holding that form discharge order omitting reference to § 523(a)(8) is res judicata against student loan creditor but noting that creditor had not moved for Fed. R. Civ. P. 60 relief in

Specifically, the courts have held that (1) a discharge order entered outside a court's authority is void on jurisdictional grounds and (2) student loans may only be discharged through an adversary proceeding, which requires specific notice, including the requisite service of process, and a meaningful opportunity to be heard *before* the discharge is granted. Anything less violates basic constitutional principles of due process.

In an attempt to construct a circuit split, Doane points to two cases involving improper plan language that, while analogous to the instant issue, were decided on different analytical grounds and, therefore, cannot form the basis for a circuit split.[5] *See Andersen v. UNIPAC-NEBHELP (In re Andersen)*, 179 F.3d 1253 (10th Cir. 1999); *Great Lakes Higher Educ. Corp. v. Pardee*, 193 F.3d 1083 (9th Cir. 1999).

In her petition, Doane claims that there is a circuit split because this case is "in direct conflict" with *Andersen* and *Pardee*. (Pet. Br. at 11). This statement is disingenuous at best but, more so, reflects Doane's failure to update her research before filing her petition. Indeed, a March 26, 2004, decision from the Ninth Circuit Bankruptcy Appellate Panel has cast serious doubt on *Pardee*, and a September 7, 2004, Tenth Circuit decision has effectively overruled *Andersen* with respect to the improper form discharge order issue. *See Poland v. Educ. Credit Mgmt. Corp. (In re*

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bankruptcy court), *effectively overruled by Poland*, 382 F.3d at 1189).

[5] Doane appears to recognize that the issues are different. *See* Pet. Brief, at 24 (stating that "[t]he erroneous form discharge issue is different from the discharge by declaration problem").

Poland), 382 F.3d 1185, 1189 (10th Cir. 2004) (reversing district court and holding that *Andersen* rule does not apply to improper form discharge orders); *Educ. Credit Mgmt. Corp. v. Repp (In re Repp)*, 307 B.R. 144, 149 (B.A.P. 9th Cir. 2004) (stating that *Pardee* did not decide issue plan language issue on due process grounds).

Andersen and *Pardee* involved the practice of debtors inserting language in their Chapter 13 plans that discharged their student loans, hoping that the student loan creditor would not see it and would fail to object to confirmation. Under 11 U.S.C. § 1327, creditors are bound by the terms of a confirmed plan. Although *Andersen* and *Pardee* both upheld the "discharge by declaration" on statutory res judicata grounds, *Andersen* requires that the plan contain specific discharge language referencing "undue hardship" or 11 U.S.C. § 523(a)(8) in order for the language to discharge the loans. *Pardee* allowed generic "the loans will be discharged" language to effectively discharge the loans. In either case, both the Ninth and Tenth Circuits admonished the practice, but both elevated the need for finality of orders over the illegal practice and held that confirmation orders were res judicata as to the student loan creditors' rights.

Petitioner's continued attempts to make *Pardee* and *Andersen* directly applicable to the instant issue by inserting the words "discharge order" into the legal discussion of *Pardee* and *Andersen* must be ignored. *See* Pet. Brief at 16-17. *Pardee* and *Andersen* involved the res judicata effect of 11 U.S.C. § 1327, which applies specifically and only to confirmation orders. Contrary to Petitioner's Brief, neither *Pardee* nor *Andersen* addressed the legal effect of the improper form

discharge orders, orders that do not fall into the statutory scope of § 1327.

In 2002, the Fourth Circuit Court of Appeals addressed the same plan language issue but analyzed it on different grounds. *See Banks*, 299 F.3d at 296. Specifically, the Fourth Circuit agreed that "a bankruptcy court confirmation order generally is afforded a preclusive effect" but held that "we cannot defer to such an order if it would result in a denial of due process in violation of the Fifth Amendment to the United States Constitution." *Id.* at 302.[6] Citing this Court's decision in *Mullane v. Central Hanover Bank & Trust*, 339 U.S. 306, 314 (1950), the Fourth Circuit held that "[w]here the Bankruptcy Code and Bankruptcy Rules specify the notice required prior to entry of an order, due process generally entitles a party to receive the notice specified before an order binding the party will be afforded preclusive effect. *See id.* Additionally, unlike *Pardee* and *Andersen*, the Fourth Circuit's *Banks* decision does apply to discharge orders as well as confirmation orders because due process, not statutory res judicata, forms the analytical basis of *Banks*. *See Banks*, 299 F.3d at 303 ("For lack of adequate notice, the confirmation and discharge orders discharging the interest are not entitled to preclusive effect.").

Since *Banks*, there has been a seismic shift in the courts' legal analysis of plan language cases, with all but one court following *Banks* and recognizing that

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[6] Contrary to Doane's Brief, the *Banks* court did not "acknowledge[] it was creating a split among the Circuits." *See* Pet. Brief, at 10.

neither *Andersen* nor *Pardee* considered whether an adversary proceeding was necessary to satisfy constitutional due process standards. *See, e.g., Repp*, 307 B.R. at 149 (due process question remains open in Ninth Circuit in spite of *Pardee); Banks*, 299 F.3d at 302 (distinguishing *Andersen*'s "need for finality trumps illegality" rule and holding that *Andersen* did not expressly address due process requirements in illegal plan language cases); *In re Ruehle*, 296 B.R. 146, 158 (Bankr. N.D. Ohio 2003) (stating that the *Andersen* court failed to "evaluate the due process concerns of a 'discharge by declaration' plan provision, which resulted in an incomplete analysis of the issues"), *aff'd* 307 B.R. 28 (B.A.P. 6th Cir. 2004) (*on appeal to 6th Cir.)*; *Educ. Credit Mgmt. Corp. v. Whelton (In re Whelton)*, 299 B.R. at 316 (noting that *Banks* decision relied on due process principles in contrast to *Andersen* and *Pardee*, which did not), *aff'd* 312 B.R. 508 (D. Vt. 2004) (*on appeal to the 2d Cir.)*; *In re Lemons*, 285 B.R. 327, 331 (Bankr. W.D. Okla. 2002) ("This court agrees with the numerous courts that characterize *Andersen* as a res judicata case, and further agrees with the *Banks* court that the *Andersen* court failed to address the due process requirement."); *but compare Poland*, 382 F.3d at 1189 n.2 (stating that "*Andersen* was wrongly decided and should be reconsidered") *with Educ. Credit Mgmt. Corp. v. Boyer (In re Boyer)*, 305 B.R. 42 (Bankr. Kan. 2004) (reviewing four consolidated cases and concluding that bankruptcy court is bound by *Andersen* rule and asserting that *Andersen* did decide the due process issue), *affirmed in part and reversed in part.*

On appeal from the *Boyer* bankruptcy court and in line with the Tenth Circuit's *Poland* decision, the Tenth Circuit Bankruptcy Appellate Panel affirmed one of the four cases consolidated in *Boyer* bankruptcy case. *See Educ. Credit Mgmt. Corp. v. Mersmann (In re Mersmann)*, ___ B.R. ___, 2004 WL 2896633 (B.A.P. 10th Cir. Dec. 14, 2004) (*Mersmann* contained the "magic language" required by *Andersen*). The BAP reversed and remanded the other three cases, holding that the bankruptcy plan language was not res judicata as to the dischargeability of the student loan debt because none of the plans referenced § 523(a)(8) or the words "undue hardship." *See Educ. Credit Mgmt. Corp. v. Boyer (In re Boyer)*, No. KS-04-015 (B.A.P. 10th Cir. Dec. 14, 2004) (unpublished); *Educ. Credit Mgmt. Corp. v. Seiwert (In re Seiwert)*, No. KS-04-016 (B.A.P. 10th Cir. Dec. 14, 2004) (unpublished); *Educ. Credit Mgmt. Corp. v. Nelson (In re Nelson)*, ___ B.R. ___, 2004 WL 2896631 (B.A.P. 10th Cir. Dec. 14, 2004). For copies of unpublished cases, see Resp. Appendix, at 1a-18a.

The Ninth Circuit BAP's *Repp* decision is especially significant because it highlights the steady erosion of the *Pardee* rule in the Ninth Circuit. Further, the Tenth Circuit's *Poland* decision effectively overruled *Andersen* regarding its applicability to the improper form discharge order, by expressly holding that *Andersen* did not apply to the discharge order because the discharge order contained no language finding that repayment of the student loan debt would constitute an undue hardship. *Poland*, F.3d at 1189.

Likewise, the ever-burgeoning body of case law, cited *supra*, reflects a judicial recognition that the *Andersen/Pardee* courts focused on the res judicata effect of confirmation under 11 U.S.C. § 1327, not on constitutional requirements of due process. This distinction is critical because a judicially created or statutorily created doctrine like res judicata cannot trump a party's constitutional rights: "[i]t is, of course, a fundamental axiom of American law, rooted in our history as a people and requiring no citations to authority, that the requirements of the Constitution prevail over a statute in the event of a conflict." *United States v. Coppa (In re United States)*, 267 F.3d 145-46 (2d Cir. 2001); *In re Hudson*, 260 B.R. 421, 444 (Bankr. W.D. Mich., 2001) ("Constitutional requirements will trump a conflicting statute, just as a statute will trump a conflicting rule.").

In the instant case, the Fourth Circuit, in line with its earlier *Banks* decision,[7] held that entry of the improper form discharge order violated ECMC's due process rights because its entry violated the minimum due process standards necessary in student loan discharge cases. Under *Mullane*, the Fourth Circuit held that

> due process entitles a student loan creditor to specific notice of the Debtor's intent to discharge any portion of the debt. Section 523(a)(8) explicitly

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[7] Contrary to Doane's Brief, the improper form discharge order was void, not because "it was within the controlling precedent of *Banks*" but because it violated ECMC's constitutional right to due process. *See* Pet. Brief, at 10.

> precludes the discharge of the Debtor's student loan debts absent a showing of undue hardship.... The Bankruptcy Code and Rules require Debtor to bring an adversary proceeding to establish undue hardship. Fed. R. Bankr. P. 7001(6).... Initiation of an adversary proceeding requires a summons and service of process under Rule 7004(b). Fed. R. Bankr. P. 7003, 7004. Banks failed to initiate an adversary proceeding to establish undue hardship. As a result, ECMC did not receive requisite notice of Banks' intent to discharge post-petition interest on his student loan debts. *For lack of adequate notice, the confirmation and discharge orders discharging the interest are not entitled to preclusive effect.*

Banks, 299 F.3d at 302-03. (emphasis added) (citations omitted); *see also Hood*, 124 S. Ct. at 1913. In *Hood*, this Court specifically referenced Fed. R. Bankr. P. 7001(6), 7003, and 7004, which require the debtor to initiate an adversary proceeding, file a summons and a complaint, and execute service of process on a specifically designated person under Fed. R. Bankr. P. 7004. *Id.*

In addition, the due process violation here went one step further than in the plan language cases: not only was ECMC denied specific notice before the improper discharge order was entered but it was also denied *any* opportunity for a hearing *before* the discharge order was entered. *Doane*, 302 B.R. at 182;

see also Mullane, 339 U.S. at 313 (opportunity to be heard must be appropriate to the nature of the case and must precede the deprivation of property at issue); *Fuentes v. Shevin*, 407 U.S. 67, 82 (1972) ("This Court has traditionally insisted that, whatever its form, opportunity for [a] hearing must be provided before the deprivation at issue takes effect.").

Even if the analysis in the plan language cases were viewed as controlling, serious doubt remains as to the vitality of *Pardee* and *Andersen* in light of *Repp* and *Poland*, and any petitioner would have difficulty successfully arguing that there is a valid split in the circuits on plan language case. Without a doubt, however, nothing Doane provides in her Petition demonstrates a circuit split regarding the improper form discharge cases.

III. There is no important federal question inherent in Doane's request.

Doane's attempt to aggrandize this issue into an "issue of federal law with significant practical consequences" requiring this Court's review fails for four equally important reasons: First, Doane admits that she is not entitled to a discharge but is simply seeking to capitalize on the fact that she received a serendipitous "discharge because the court used the erroneous form discharge order." *See* Pet. Brief, at 12 n.4. This case is nothing more than a debtor hoping to capture a windfall. Further Doane's admission that she does not qualify for a discharge under 11 U.S.C. § 523(a)(8) highlights the injustice that would result if any court granted the relief that Doane requests. Moreover, the fact that Doane had "clean hands" unlike

the debtors in the plan language cases is irrelevant. In the same vein, ECMC did absolutely nothing wrong and should not suffer the consequences of the court's error. Due process is not a blame-based inquiry.

Second, it is unclear why Doane attempts to place such emphasis on the memoranda that issued from the Administrative Office of U.S. Courts (AO) following the repeal of the sunset language. None of the information regarding the AO memoranda was in the record, was considered by any of the courts below, or is even in Doane's Appendix to her Petition. But even the recitation in her brief summarizing the information contained in those memoranda clearly shows that the mistake in using the outdated orders falls squarely on the shoulders of the bankruptcy courts. *See* Pet. Brief, at 22 (noting that in December 1994, the AO issued a revised form discharge order that removed the "October 1, 1996, language"). Thus, as of December 1994, almost two years before the use of the form discharge orders containing the October 1, 1996, language would become problematic, all bankruptcy courts were on notice that the form discharge order had been revised.

Regardless of blame, orders that are entered in a manner inconsistent with due process are void under Fed. R. Civ. P. 60(b)(4). A void judgment is

> [o]ne which from its inception is and forever continues to be absolutely null, without legal efficacy, ineffectual to bind parties or support a right, of no legal force and effect whatever, and incapable of

> confirmation, ratification, or enforcement in any manner or to any degree.

Black's Law Dictionary 1574 (6th ed. 1990). If a judgment is void because it violates due process, a party may move for Rule 60 relief "without appealing therefrom." *See Winhoven v. United States*, 201 F.2d 174, 175 (9th Cir. 1952); *see also Central States, Southeast & Southwest Areas Pension Fund v. Wintz Props.*, 155 F.3d 868, 875 (7th Cir. 1998) ("[V]oid order has no bite.").

Third, there is no disparate treatment of this issue across jurisdictions and there is no uncertainty. As noted above, every court that has decided this issue has held that the improper form discharge order is not valid—either on due process grounds or on other grounds such as those relied on by the Tenth Circuit in *Poland*.

Fourth, case law reflects that courts across the United States, from bankruptcy courts on up, are applying this Court's constitutional holdings uniformly. *See* Note 4, *supra*; *see also In re Tyler*, 285 B.R. 635 (Bankr. W.D. Tex. 2002) (granting ECMC relief under Fed. R. Civ. P. 60(b)(4)); *In re Amos*, 283 B.R. 864 (Bankr. W.D. Ky. 2002) (relying on due process grounds to hold that improper form discharge order was "erroneous as a matter of law). In this instance, it is only Doane who is asking to be treated differently.

CONCLUSION

On the whole of the record, Doane's Petition does not even approach the threshold necessary to invoke this Court's discretionary review. Moreover, Doane admits that she never sought to discharge her student loan debt through bankruptcy but seeks only to capitalize on an error by the court, irrespective of the denial of due process to ECMC. Further, Doane's attempt to construct a circuit split fails because of her miscitation of the issues and the law in the relevant circuits. The reality is that courts have consistently granted relief from the improper form discharge order, thereby ratifying the fundamental precept that all parties, even student loan creditors, are entitled to notice and an opportunity for a hearing before their substantive rights can be affected. The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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FILED
U.S. Bankruptcy Appellate Panel
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NOT FOR PUBLICATION

BAP No. KS-04-015
Bankr. No. 96-42993-13
Adv. No. 02-7141
Chapter 13

UNITED STATES BANKRUPTCY APPELLATE PANEL OF THE TENTH CIRCUIT

IN RE DEAN ALAN BOYER
and KARLA JOY BOYER,
Debtors.

EDUCATIONAL CREDIT
MANAGEMENT CORPORATION,
Plaintiff – Appellant,

v.

DEAN ALAN BOYER and KARLA JOY BOYER,
Defendants – Appellees.

Appeal from the United States Bankruptcy
Court for the District of Kansas

Filed December 14, 2004

ORDER AND JUDGMENT[1]

Before CORNISH, MICHAEL, and THURMAN, Bankruptcy Judges.

CORNISH, Bankruptcy Judge.

Educational Credit Management Corporation (ECMC) timely appeals a final Judgment entered by the United States Bankruptcy Court for the District of Kansas declaring, in relevant part, certain portions of the debtors' student loan debt to be discharged pursuant to a provision in their confirmed Chapter 13 Plan.[2] The parties have consented to this Court's jurisdiction because they have not elected to have the appeal heard by the United States District Court for the District of Kansas.[3] For the reasons stated below, the bankruptcy court's Judgment is REVERSED and the matter is REMANDED.

I. Background

The debtors filed a Chapter 13 petition in 1996. They scheduled ECMC's predecessor in interest (who will be referred to as "ECMC") as a creditor holding a general unsecured claim for unpaid student loans.

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[1] This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. 10th Cir. BAP L.R. 8018-6(a).

[2] 28 U.S.C. § 158(a)(1); Fed. R. Bankr. P. 8002(a).

[3] 28 U.S.C. § 158(b)-(c); Fed. R. Bankr. P. 8001(e).

The Chapter 13 Plan proposed by the debtors contained the following relevant provisions:

THE PROVISIONS OF THIS PLAN ALTER CONTRACTS AND LEGAL RELATIONSHIPS PREVIOUSLY EXISTING. PERSONS AFFECTED ARE ADVISED TO SEEK LEGAL ADVICE IF THEY DO NOT AGREE OR DO NOT UNDERSTAND THE PROVISIONS OF THIS WHOLE PLAN.

. . . .

Student Loan creditors will be paid the remaining unpaid original principal amount of any claim next from any funds paid the trustee during the plan. During the pendency of the Bankruptcy Proceeding, no interest or penalties will accrue on these debts or claims. All such debts other than the remaining unpaid original principal amount of the loans remaining unpaid upon completion of the plan will be discharged upon entry of any discharge hereunder.

If the funds so paid do not repay the remaining unpaid original principal amount of any such debts, then the remaining unpaid original principal will be repaid by the debtor over a period of ten years after discharge at the then current interest rate for student loans.[4]

Accordingly, through this provision, the debtors proposed to discharge prepetition interest on their student loans, and any interest or penalties that accrued on that debt during their Chapter 13 case

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[4] Chapter 13 Plan at 2, Appellant's Appendix at 54

(collectively, the "Interest"). Despite the debtors' proposal to discharge the Interest through the confirmation of their Plan, not by a judgment pursuant to 11 U.S.C. § 523(a)(8),[5] ECMC did not object to confirmation of this Plan. In May, 1997, the bankruptcy court entered an Order confirming the debtors' Plan (Confirmation Order). ECMC did not appeal the Confirmation Order.

In July, 1997, ECMC filed a proof claim in the debtors' case, asserting a general unsecured claim in the total amount of $33,724.90. Of this amount, $26,694.09 was claimed as principal (Principal Debt). The debtors objected to ECMC's proof of claim, arguing that it was not supported by proper documentation. ECMC amended its proof of claim, reducing its claim for Interest, but it never filed a pleading responding to the debtors' claim objection. Thus, being unopposed, the bankruptcy court entered an Order sustaining the debtors' claim objection (Claim Order). Although the claim objection only requested that ECMC's proof of claim be disallowed, the Claim Order prepared by the debtors' counsel states that the entire student loan debt reflected in the proof of claim was discharged. This Claim Order, therefore, is broader than the Confirmation Order in that it purports to discharge both the student loan Principal Debt and Interest.

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[5] All future statutory references in the text are to title 11 of the United States Code. Section 523(a)(8) states that student loan debt is excepted from discharge, unless doing so "will impose an undue hardship on the debtor and the debtor's dependents." 11 U.S.C. § 523(a)(8); *see* Fed. R. Bankr. P. 4007(a)-(b) & 7001(6) (adversary proceeding necessary to determine the dischargeability of a debt, and the debtor may file a complaint to commence such a proceeding at any time).

The debtors completed all payments under their confirmed Plan. Because ECMC's claim was disallowed by the Claim Order, it received no payments through the debtors' confirmed Plan.

In May, 2001, the bankruptcy court entered a "Discharge Order," granting the debtors a discharge pursuant to § 1328(a). The Discharge Order discharged the debtors' student loan debt in its entirety.[6] This form Order is not in accord with the version of § 523(a)(8) applicable in the debtors' case requiring their entire student loan debt to be excepted from discharge, and it also contradicts the Confirmation Order, which only discharged the debtors' student loan Interest.

Subsequently, ECMC commenced an adversary proceeding against the debtors, seeking a determination as to the dischargeability of the debtors' student loan debt. It alleged that the debt was not discharged by the Claim Order, and it requested that the Claim Order be amended pursuant to Federal Rule

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[6] The Discharge Order states:

1. Pursuant to 11 U.S.C. Section 1328(a) the debtor is discharged from all debts provided for by the plan or disallowed under 11 U.S.C. Section 502, except any debt:

. . . .

(c) for a student loan . . . as specified in 11 U.S.C. Section 523(a)(8) in any case in which discharge is granted prior to October 1, 1996[.]

Discharge Order at 1, *quoted in Educ. Credit Mgmt. Corp. v. Boyer (In re Boyer)*, 305 B.R. 42, 55 (Bankr. D. Kan. 2004). As discussed by the bankruptcy court, this language arose from a prior version of § 523(a)(8) and was included in the form order generated by the clerk of court by mistake. *Id.*

of Civil Procedure 60(b)(4) or (b)(6).[7] The debtors, in turn, asserted that the subsequent Discharge Order discharged the student loans in their entirety. ECMC then filed a motion to amend the Claim Order and/or the Discharge Order and a Motion for Summary Judgment. In these papers, it argued that the discharge provision in the debtors' confirmed Plan did not apply to the Principal Debt. ECMC also alleged that the Interest was not discharged by the confirmed Plan because the debtors did not obtain a judgment under § 523(a)(8). The debtors opposed ECMC's Motions.

The bankruptcy court entered Judgement in favor of ECMC in part, and in favor of the debtors in part. It held that the student loan Principal Debt, plus post-discharge interest, was not discharged, but that the Interest was discharged. The bankruptcy court's Judgment is supported by separate findings of fact and conclusions of law, set forth in a Memorandum and Order.[8]

In its Memorandum and Order, the bankruptcy court held that the Principal Debt was excepted from discharge under § 523(a)(8) because the debtors had not

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[7] Federal Rule of Civil Procedure 60(b) is made applicable in bankruptcy cases by Federal Rule of Bankruptcy Procedure 9024.

[8] *Boyer*, 305 B.R. at 42. This Memorandum and Order contains findings of fact and conclusions of law related to the Judgment entered in the debtors' case, as well the Judgments entered in three other Chapter 13 cases involving similar facts and issues. *In re Seiwert*, Bankr. No. 96-43032-13 (Bankr. D. Kan.); *Educ. Credit Mgmt. Corp. v. Nelson (In re Nelson)*, Bankr. No. 98-41327-13, Adv. No. 03-7025 (Bankr. D. Kan.); *In re Mersmann*, Bankr. No. 98-41940-13 (Bankr. D. Kan.) [hereinafter referred to collectively as the "Related Debtor Cases"].

obtained a "hardship discharge" under that section, and the discharge provision in the debtors' confirmed Plan did not apply to the Principal Debt. It refused to enforce the Claims Order and the Discharge Order to the extent that they stated that the Principal Debt was discharged. The Interest, however, was excepted from discharge pursuant to the terms of the debtors' confirmed Plan, even though they did not obtain a judgment against ECMC pursuant to § 523(a)(8). The bankruptcy court held that under *Andersen v. UNIPAC-NEBHELP (In re Andersen)*,[9] ECMC could not collaterally attack the final Confirmation Order that discharged the Interest when the debtors completed their Plan payments. It did not address the discharge of the Interest pursuant to the Claim Order and the Discharge Order because the Confirmation Order controlled, and its discharge of the Interest did not conflict with those Orders, both of which discharged the student loan debt.

ECMC appealed the bankruptcy court's Judgment.[10] The debtors did not appeal the portions of the

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[9] 179 F.3d 1253 (10th Cir. 1999).

[10] ECMC also appealed the Judgment entered by the bankruptcy court in each of the Related Debtor Cases. The bankruptcy court's Judgment in two of the Related Debtor Cases is reversed for the same reasons stated in this Order and Judgment. *In re Seiwert*, BAP No. KS-04-016 (10th Cir. BAP filed Dec. 14, 2004); *Educ. Credit Mgmt. Corp. v. Nelson (In re Nelson)*, __ B.R. __, BAP No. KS-04-017 (10th Cir. BAP filed Dec. 14, 2004). In the third Related Debtor Case, *In re Mersmann*, we have entered an Opinion affirming the bankruptcy court's Judgment. __ B.R. __, BAP No. KS-018 (10th Cir. BAP filed Dec. 14, 2004). Unlike this case or the other two Related Debtor Cases, the discharge clause in the confirmed plan in *Mersmann* contained a "finding of undue

bankruptcy court's Judgment adverse to them.[11] The only issue before this Court is whether the bankruptcy court erred in discharging the student loan Interest.

II. Discussion

For the same reasons stated in *Educational Credit Management Corp. v. Nelson (In re Nelson)*,[12] the portion of the bankruptcy court's Judgment declaring the student loan Interest to be discharged under the debtors' confirmed Plan must be reversed in light of *Poland v. Educational Credit Management Corp. (In re Poland)*.[13] The debtors' confirmed Plan contains no "finding of undue hardship" and, therefore, it does not discharge the student loan Interest. The debtors can only obtain a discharge of their student loan debt by commencing an adversary proceeding against ECMC under § 523(a)(8), and proving that payment of that debt will impose an "undue hardship" on them and their dependents.[14]

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hardship" and, therefore, under *Andersen*, 179 F.3d at 1256, that finding was binding on ECMC. *See Poland v. Educ. Credit Mgmt. Corp. (In re Poland)*, 382 F.3d 1185, 1189 (10th Cir. 2004) & discussion *infra*.

[11] As such we need not, and cannot, address the propriety of the bankruptcy court's decision refusing to enforce the provisions of the Claim Order and the Discharge Order as they relate to the Principal Debt.

[12] __ B.R. __, BAP No. KS-04-017, Slip Op. at 5-8; *accord Seiwert*, BAP No. KS-04-016, Slip. Op. at 6.

[13] 382 F.3d 1185 (10th Cir. 2004).

[14] 11 U.S.C. § 523(a)(8); Fed. R. Bankr. P. 4007(a)-(b) & 7001(6); *Poland*, 382 F.3d at 1189 (adversary proceeding required, and

While the student loan Interest was not discharged by the debtors' confirmed Plan as a matter of law under *Poland*, we note that the Claim Order and the Discharge Order state that the debtors' entire student loan debt, including the Interest, is discharged. Although ECMC challenged these discharge provisions below, requesting in its Complaint and in subsequent motions that both Orders be altered or amended to except the Interest from discharge, the bankruptcy court did not rule on ECMC's request for judgment or motions because it had concluded that the Interest was discharged pursuant to the confirmed Plan. We therefore remand this matter to the bankruptcy court to address ECMC's challenge of the discharge of Interest in the Claim Order and the Discharge Order.

III. Conclusion

The bankruptcy court's Judgment is REVERSED, and the case is REMANDED to the bankruptcy court for further proceedings consistent with this Order and Judgment.

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debtor has burden to prove "undue hardship"); *Andersen*, 179 F.3d at 1256 (same); *Mersmann*, __ B.R. __, BAP No. KS-04-018, Slip. Op. at 5-6 (same); *see generally Educ. Credit Mgmt. Corp. v. Polleys (In re Polleys)*, 356 F.3d 1302 (10th Cir. 2004) (discussing elements of "undue hardship"); *In re Woodcock*, 45 F.3d 363 (10th Cir. 1995) (debtor has burden to prove "undue hardship"); *Alderete v. Educ. Credit Mgmt. Corp. (In re Alderete)*, 308 B.R. 495 (10th Cir. BAP 2004) (discussing elements of "undue hardship," and debtor has burden of showing by preponderance of the evidence).

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U.S. Bankruptcy Appellate Panel
of the Tenth Circuit
December 14, 2004
Barbara A. Schermerhorn Clerk

NOT FOR PUBLICATION

BAP No. KS-04-016
Bankr. No. 96-43032-13
Chapter 13

UNITED STATES BANKRUPTCY APPELLATE PANEL OF THE TENTH CIRCUIT

IN RE CONNIE ANN SEIWERT,
Debtor.

EDUCATIONAL CREDIT MANAGEMENT CORPORATION,
Appellant,

v.

CONNIE ANN SEIWERT,
Appellee.

Appeal from the United States Bankruptcy Court for the District of Kansas

ORDER AND JUDGMENT[1] *

[1] This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. 10th Cir. BAP L.R. 8018-6(a).

Before CORNISH, MICHAEL, and THURMAN, Bankruptcy Judges.

CORNISH, Bankruptcy Judge.

Educational Credit Management Corporation (ECMC) timely appeals a final Judgment entered by the United States Bankruptcy Court for the District of Kansas declaring, in relevant part, certain portions of the debtor's student loan debt to be discharged pursuant to a provision in her confirmed Chapter 13 Plan.[2] The parties have consented to this Court's jurisdiction because they have not elected to have the appeal heard by the United States District Court for the District of Kansas.[3] For the reasons stated below, the portion of the bankruptcy court's Judgment declaring the student loan debt to be discharged is REVERSED.

I. Background

The debtor filed a Chapter 13 petition in 1996. She scheduled ECMC's predecessor in interest (who will be referred to as "ECMC") as a creditor holding a general unsecured claim for unpaid student loans in the total amount of $22,000.

The Chapter 13 plan proposed by the debtor stated, in relevant part, that:

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[2] 28 U.S.C. § 158(a)(1); Fed. R. Bankr. P. 8002(a).

[3] 28 U.S.C. § 158(b)-(c); Fed. R. Bankr. P. 8001(e).

SPECIAL CLASS CREDITORS (Designate total for class and % to pay) Student Loan Creditors _____ $_22,000_____100%__

. . . .

THE PROVISIONS OF THIS PLAN ALTER CONTRACTS AND LEGAL RELATIONSHIPS PREVIOUSLY EXISTING. PERSONS AFFECTED ARE ADVISED TO SEEK LEGAL ADVICE IF THEY DO NOT AGREE OR DO NOT UNDERSTAND THE PROVISIONS OF THIS WHOLE PLAN.

. . . .

Student Loan creditors will be paid the remaining unpaid original principal amount of any claim next from any funds paid the trustee during the plan. During the pendency of the Bankruptcy Proceeding, no interest or penalties will accrue on these debts or claims. All such debts other than the remaining unpaid original principal amount of the loans remaining unpaid upon completion of the plan will be discharged upon entry of any discharge[] hereunder.[4]

Accordingly, through this provision, the debtor proposed to discharge prepetition interest on her student loans, and any interest or penalties that accrued on that debt during her Chapter 13 case (collectively, "Interest").

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[4] Chapter 13 Plan at 2, Appellant's Appendix at 198.

While confirmation of this Plan was pending, ECMC filed a proof claim in the debtor's case, asserting a claim with a principal balance of $26,259.39, and prepetition interest of almost $3,000. The Chapter 13 trustee objected to ECMC's proof of claim, arguing that "PER PLAN ONLY ORIGINAL PRINCIPAL AMOUNT TO BE PAID" (Claim Objection).[5] ECMC did not respond to the Claim Objection.

While the Claim Objection was pending, a hearing on the confirmation of the debtor's Plan was held. Despite the debtor's proposal to discharge the student loan Interest through the confirmation of her Plan, not by a judgment pursuant to 11 U.S.C. § 523(a)(8),[6] ECMC did not object to confirmation of the Plan. In May, 1997, the bankruptcy court entered an Order confirming the debtor's proposed Plan (Confirmation Order). ECMC did not appeal the Confirmation Order.

After the Confirmation Order was entered, the bankruptcy court entered an Order sustaining the unopposed Claim Objection (Claim Order). The Claim Order states that ECMC's claim is allowed as a "SPCL CLASS-UNSECURED claim in the amount of

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[5] Claim Objection at 1, Appellant's Appendix at 209.

[6] All future statutory references in the text are to title 11 of the United States Code. Section 523(a)(8) states that student loan debt is excepted from discharge, unless doing so "will impose an undue hardship on the debtor and the debtor's dependents." 11 U.S.C. § 523(a)(8); *see* Fed. R. Bankr. P. 4007(a)-(b) & 7001(6) (adversary proceeding necessary to determine the dischargeability of a debt, and the debtor may file a complaint to commence such a proceeding at any time).

$22,000," with an unsecured claim in the amount of $7,028.76.[7] ECMC did not appeal the Claim Order.

Several years later, the debtor completed payments under her confirmed Plan, including payments to ECMC totaling $22,000. As a result, in May, 2002, the bankruptcy court entered a "Discharge Order," granting the debtor a discharge pursuant to § 1328(a). Contrary to her confirmed Plan, the Discharge Order excepts the debtor's entire student loan debt from discharge. In July, 2002, a Final Decree was entered, and the debtor's Chapter 13 case was closed.

Almost one year after her case was closed, the debtor was notified that ECMC would offset a government payment to which she was entitled against her unpaid student loan debt. The debtor allegedly owed approximately $4,000.00 in principal (Principal Debt),[8] plus the Interest. In response, the debtor filed an "Application for Citation in Contempt," alleging that ECMC had violated the discharge injunction by attempting to collect the discharged student loan debt (Contempt Motion). The bankruptcy court reopened the debtor's Chapter 13 case and issued an Order to Show Cause (OSC), requiring ECMC to appear.

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[7] Claim Order at 1, Appellant's Appendix at 210.

[8] The debtor had paid ECMC $22,000 through her Plan, but ECMC asserted in its proof of claim that the principal debt was over $26,000. While ECMC's claim for principal in excess of $22,000 was disallowed in the debtor's Chapter 13 case by the Claim Order, the nondischargeable debt in excess of $22,000 survived the Chapter 13 case.

ECMC responded to the debtor's Contempt Motion and the OSC, alleging that the Discharge Order excepted the entire student loan debt from discharge. It maintained that the conflicting Confirmation Order, purporting to discharge otherwise nondischargeable Interest on the debtor's student loan debt, was void because the debtor had not commenced an adversary proceeding against it to obtain a determination of "undue hardship" under § 523(a)(8). It also argued that, even if the Confirmation Order served to discharge student loan debt, the discharge extended only to the Interest, not the Principal Debt.

The bankruptcy court entered a Judgment in favor of ECMC in part, and in favor of the debtor in part. It denied the debtor's Contempt Motion because the Principal Debt had not been discharged under the terms of the debtor's confirmed Plan and, therefore, the debtor was required to pay ECMC that Debt, plus post-discharge interest. However, ECMC was barred from collecting the Interest because it had been discharged pursuant to the terms of her confirmed Plan.

The bankruptcy court's Judgment is supported by separate findings of fact and conclusions of law, set forth in a Memorandum and Order.[9] The bankruptcy

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[9] *Educ. Credit Mgmt. Corp. v. Boyer (In re Boyer)*, 305 B.R. 42 (Bankr. D. Kan. 2004). This Memorandum and Order contains findings of fact and conclusions of law related to the Judgment entered in the debtor's case, captioned above, as well the Judgments entered in three other Chapter 13 cases involving the similar facts and issues. *Educ. Credit Mgmt. Corp. v. Boyer (In re Boyer)*, Bankr. No. 96-42993-13, Adv. No. 02-7141 (Bankr. D. Kan.); *Educ. Credit Mgmt. Corp. v. Nelson (In re Nelson)*, Bankr. No. 98-41327-13, Adv. No. 03-7025 (Bankr. D. Kan.); *In re Mersmann*,

court relied on *Andersen v. UNIPAC-NEBHELP (In re Andersen)*,[10] in concluding that the student loan Interest was discharged, even though a § 523(a)(8) proceeding had not been commenced against ECMC. Specifically, it held that ECMC could not collaterally attack the final Confirmation Order that discharged the Interest when the debtor completed her Plan payments. It also stated that the contrary Discharge Order did not compel a different result, and denied "ECMC's request to enforce" the Discharge Order.[11]

ECMC timely appealed the bankruptcy court's Judgment, asserting that it erred in discharging the student loan Interest.[12] The debtor did not cross appeal

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Bankr. No. 98-41940-13 (Bankr. D. Kan.) [hereinafter referred to collectively as the "Related Debtor Cases"].

[10] 179 F.3d 1253 (10th Cir. 1999).

[11] *Boyer*, 305 B.R. at 55.

[12] ECMC also appealed the Judgment entered by the bankruptcy court in each of the Related Debtor Cases. The bankruptcy court's Judgment in two of the Related Debtor Cases is reversed for the same reasons stated in this Order and Judgment. *Educ. Credit Mgmt. Corp. v. Boyer (In re Boyer)*, BAP No. KS-04-015 (10th Cir. BAP filed Dec. 14, 2004); *Educ. Credit Mgmt. Corp. v. Nelson (In re Nelson)*, __ B.R. __, BAP No. KS-04-017 (10th Cir. BAP filed Dec. 14, 2004). In the third Related Debtor Case, *In re Mersmann*, we have entered an Opinion affirming the bankruptcy court's Judgment. __ B.R. __, BAP No. KS-018 (10th Cir. BAP filed Dec. 14, 2004). Unlike this debtor's case or the other two Related Debtor Cases, the discharge clause in the confirmed plan in *Mersmann* contained a "finding of undue hardship" and, therefore, under *Andersen*, 179 F.3d at 1256, that finding was binding on ECMC. *See Poland v. Educ. Credit Mgmt. Corp. (In re Poland)*, 382 F.3d 1185, 1189 (10th Cir. 2004) & discussion *infra*.

the portion of the Judgment denying her Contempt Motion and, therefore, this Court has no jurisdiction over that portion of the Judgment. Accordingly, the only issue before us is whether the bankruptcy court erred in discharging the student loan Interest pursuant to the terms of the debtor's confirmed Plan.

II. Discussion

For the same reasons stated in *Educational Credit Management Corp. v. Nelson (In re Nelson)*,[13] the portion of the bankruptcy court's Judgment declaring the student loan Interest to be discharged pursuant to the debtor's confirmed Plan must be reversed in light of *Poland v. Educational Credit Management Corp. (In re Poland)*.[14] The debtor's Plan contains no "finding of undue hardship" and, therefore, it does not discharge the student loan Interest.[15] There being no adjudication of undue hardship binding ECMC, the debtor can only obtain a discharge of her student loan debt by commencing an adversary proceeding against ECMC under § 523(a)(8), and proving that payment of

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[13] __ B.R. __, BAP No. KS-04-017, Slip Op. at 5-8; *accord Boyer*, BAP No. KS-04-015, Slip Op. at 6-8.

[14] 382 F.3d 1185 (10th Cir. 2004).

[15] The Discharge Order excepts the debtor's entire student loan debt from discharge. The bankruptcy court, holding that the Interest was discharged under the confirmed Plan, refused to enforce the Discharge Order as to the Interest. It did not, however, alter the Discharge Order. Accordingly, the Discharge Order now conforms to our holding that the Interest, as well as the Principal Debt, is excepted from discharge.

the debt will impose an "undue hardship" on her and her dependents.[16]

III. Conclusion

The portion of the bankruptcy court's Judgment declaring the student loan Interest to be discharged is REVERSED.

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[16] 11 U.S.C. § 523(a)(8); Fed. R. Bankr. P. 4007(a)-(b) & 7001(6); *Poland*, 382 F.3d at 1189 (adversary proceeding required, and debtor has burden to prove "undue hardship"); *Andersen*, 179 F.3d at 1256 (same); *Mersmann*, __ B.R. __, BAP No. KS-04-018, Slip Op. at 5-6, (same); *see generally Educ. Credit Mgmt. Corp. v. Polleys (In re Polleys)*, 356 F.3d 1302 (10th Cir. 2004) (discussing elements of "undue hardship"); *In re Woodcock*, 45 F.3d 363 (10th Cir. 1995) (debtor has burden to prove "undue hardship"); *Alderete v. Educ. Credit Mgmt. Corp. (In re Alderete)*, 308 B.R. 495 (10th Cir. BAP 2004) (discussing elements of "undue hardship," and debtor has burden of showing by preponderance of the evidence).